

Nos. 04-56916 and 04-57173

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Consolidated Case Nos. 04-56916 and 04-57173

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY;
FAIR HOUSING COUNCIL OF SAN DIEGO,
Plaintiffs, Appellants, and Appellees,

v.

ROOMMATES.COM, LLC,
Defendant, Appellee, and Appellant.

On Appeal from the United States District Court
for the Central District of California
The Honorable Percy Anderson
United States District Judge, Presiding
Case No. CV-03-09386 PA (RZx)

**APPELLANTS' SUPPLEMENTAL
EXCERPTS OF THE RECORD**

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 FAIR HOUSING COUNCIL OF SAN
11 FERNANDO VALLEY; FAIR
12 HOUSING COUNCIL OF SAN
13 DIEGO, individually and on behalf of
14 the GENERAL PUBLIC,

15 Plaintiffs,

16 vs.

17 ROOMMATES.COM, LLC

18 Defendants.

CASE NO. CV03-9386 PA (RZx)

OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

DATE: September 13, 2004

TIME: 1:30 a.m.

COURTROOM: 15

Honorable Percy Anderson

[Statement of Genuine Issues,
Declarations and Exhibits Filed
Concurrently Herewith]

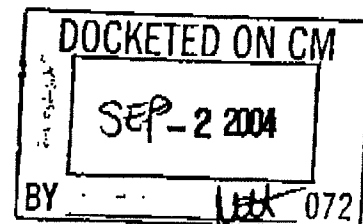


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1 I. INTRODUCTION

2 Plaintiffs respectfully submit this Opposition to Defendant's Motion for
3 Summary Judgment.

4 In its operation of a rental housing website Defendant Roommates.com makes
5 several unlawful inquiries into the personal characteristics of all persons looking for
6 a place to live. Defendant next creates and distributes matches based mostly on this
7 illegal criteria. Defendant also makes and advertises discriminatory statements that
8 indicate preferences based on race, religion, national origin, gender, familial status,
9 age, sexual orientation, source of income, and disability, all in violation of the fair
10 housing laws.

11 Defendant's motion attacks the Fair Housing Council's claims by
12 mischaracterizing the claims as focused on expression. Defendant also
13 mischaracterizes its own operation. Defendant is a commercial rental service with
14 thousands of listings for rooms for rent and it takes money from persons "looking for
15 a place to live" in exchange for access to the listings of members who have "rooms for
16 rent" and to its "e-newsletter" which distributes matches and profiles. Yet, in its
17 motion for summary judgment Defendant casts itself as merely a more-or-less passive
18 bulletin board service for locating roommates, one that does not engage in commercial
19 speech. Taking into account Defendant's pro-active role in discrimination, the
20 immunity arguments Defendant advances should be rejected.

21 Defendant's also want the court to change the law. Defendant advances theories
22 that the fair housing laws must either be interpreted narrowly to allow statements like
23 "Not looking for black muslims" or "Christian preferred" to return to housing ads in
24 our country or else the fair housing laws themselves must be struck down. This
25 argument is made despite the fact that the U.S. Supreme Court has specifically stated
26 that the FHA should be liberally construed.

27

28

1 II. SUMMARY OF RELEVANT FACTS

2 Defendant Roommates.com, LLC operates a rental website at
3 <http://www.roommates.com>. Plaintiffs' Statement of Genuine Issues ("Pltf. Stm."),
4 ¶ 1.¹ Defendant advertises on the front page of its website that it has "151,541
5 Roommates, Rooms for Rent" and "Let us help you find a roommate and/or a room
6 for rent."² Id. ¶ 33. This website divides its members and potential members into
7 two groups: those "looking for a place to live" and those who "have a place
8 available for rent." Id. ¶ 82. Another way Defendant puts it on its website is
9 "looking for a room" and "renting a room." Id. ¶ 82. Members who want to see
10 information about other members must pay Defendants for an upgraded
11 membership. Id. ¶ 7. Defendant has provided rental services in two or more
12 transactions involving the rental of any dwelling within the preceding twelve
13 months. Id. ¶ 34. Defendant also caters directly to so-called landlords. Id. ¶ 35.

14 Members are required to create a nickname. The nicknames Roommate.com
15 allowed to be posted in June of 2004 include the following: ChristianGrl, CatholicGirl,
16 ChristianGuy, Christianhme, ChristianLdy, Asianpride, AsianAmrican, Asianmale,
17 Whitehme, Whiteguy, Whiteguy97, whitekenneth, Whiteboy, Whiteboy23,
18 Whiteboy73, Whiteboy80, Whiteboy 84, Whiteboy696, Chinesegirl, Latinpride,
19 Latina03, Latina32, Latino22, Latino29, Latino78, Latin, Blackguy, Blackboi,
20 Blackman, and Blackmale. Id. 36.

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25 ¹All evidentiary citations herein are to the numbered paragraphs in Plaintiffs'
26 Statement of Genuine Issues of Material Fact, filed concurrently herewith, or to the
27 numbered paragraphs of the Defendant's Statement of Uncontroverted Facts ("Dfdt.
28 Stm.").

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² Relying on its first Separate Statement of Fact, Defendant claims throughout its
brief that it is merely a "roommate locator service." The website's actual emphasis on
"rooms for rent" show that defendant is both a roommate locator service and a rental
service.

1 A. Defendant Requires Members "Looking for a Place to Live" To Disclose Details
2 With Respect to Their Age, Profession (or lack thereof), Gender, Sexual Orientation,
3 and Familial Status.

4 If a person "looking for a place to live" (Defendant's words) wished to be
5 considered by the many persons on the website who have a place available, the person
6 must provide a profile. *Id.* ¶ 37. The *About Me* page shows what criteria Roommate.com
7 has chosen to demand, including Age, Gender, Sexual Orientation, Occupation, Pets,
8 and Children. Persons looking for a place to live are not allowed to leave any of these
9 questions blank. *Id.* ¶ 38. If they attempt to do so, the screen is frozen with a
10 Internet Explorer warning box that says "Age Is Required" or "Gender is Required".
11 *Id.* ¶ 38.

12 As another example, if a person looking for a place to live does not want to
13 disclose their sexual orientation and tries to leave it blank and then submit their
14 "About Me" profile, the warning box pops up in the middle of the screen stating
15 "Internet Explorer, Sexual Orientation is Required." *Id.* The person must return
16 to the profile and select one of two choices: 1) "Straight" or 2) "Gay/Lesbian." With
17 regard to Familial Status, "children selection is required" pops up unless the person
18 discloses whether or not "children will be present." *Id.* During the deposition of
19 Bryan Peters, who is president of Roommate.com, LLC, Mr. Peters accessed the
20 website and confirmed that a person attempting to look for a place to live cannot
21 become a member unless they disclose their age, sexual orientation, gender, and
22 familial status. *Id.* ¶ Mr. Peters also confirmed that he and his brother, co-owner
23 Brett Peters, wrote the text that one sees in the pop-up box that indicates the
24 disclosures are required. *Id.* ¶ 39.

25 These disclosure requirements made by the defendant (which then shares those
26 disclosures with persons who have a place to rent or otherwise matches them up based
27 on the disclosures) are similar to at least part of the duties that managing agents or
28 property management companies perform for their client-landlords when they screen

1 applicants. Id. ¶ 40. In other words, Defendant is in the business of providing rental
2 services separate and apart from any publishing, advertising, and distribution services
3 also provided by defendant.

4 The "lifestyle" criteria Age, Gender, Sexual Orientation, Occupation, and
5 Children required by Roomates.com match the fair housing protected classes of
6 persons that the plaintiffs and also other fair housing councils strive to assist. Id. ¶
7 41.

8
9 B. Defendant Provides Members With a "Place Available For Rent" With a Selection
10 of "Preferences" With Respect to the Age, Gender, Sexual Orientation and Familial
11 Status of Persons Looking for a Place To Live.

12
13 When a member who has a place available to rent attempts to post this rental
14 opportunity on the website, Roomate.com requests in rather mandatory language,
15 "Select the criteria by which we should match your potential roommate." Id. ¶ 42.
16 The criteria are identical to the criteria demanded of the persons looking for a place
17 to rent, and they include age, gender, profession, sexual orientation and the so-called
18 presence of children. Id. This symmetry enables Roommate.com to create matches
19 based on these categories. Id. 43. Roommate.com emails these matches to both sets
20 of members. The website also encourages members to prioritize " according to age
21 ... " Id.

22 Limiting Housing Opportunities. Thus, the fair housing kicker in this
23 "preferences" scheme is that the persons who go ahead and disclose the required
24 information based on age, sexual orientation, profession, and familial status will have
25 their housing opportunities limited by that information because of the preferences and
26 matching system. In some, if not many, cases, a person's housing opportunities could
27 be very limited. For example, if a person discloses that she is lesbian, then the
28 Defendant will not send her notice of any housing opportunities where the person with

1 a "place available to rent" said that he or she wanted only straight persons after being
2 prompted to do so by the Defendant. *This limitation is paired*
3 *with housing crises in both cities. Id. ¶ 89.*

4 C. The Defendant Has Advertised and Continues to Advertise Numerous Rental
5 Opportunities That Contain Preferences Explicitly Based on Race, National Origin,
6 Religion, and all the other protected classes.

7 As already shown above in the discussion of the nicknames Roomates.com uses
8 in its advertising and rental services, there are also numerous statements with respect
9 to available dwellings that indicate preferences based on race, national origin, religion,
10 gender, disability, sexual orientation, disability, and religion. For example, the person
11 who identified herself in June of 2004 with the nickname *ChristianGrl* has a "big"
12 place available to rent in Hollywood, "near everything." However, even though many
13 persons looking for a place to live in Hollywood might be interested, they will have
14 to be Christian to even be considered as *ChristianGrl* is "looking for a Christian
15 roommate." Id. ¶ 44.³

16 The defendant has admitted that its members use an open-ended section on its
17 website "to indicate racial or religious preferences." Id. 45.

18 With respect to race or national origin, and as shown in Plaintiffs' Statements
19 44-55 and Exhibit 9, the following statements appeared on the website in November
20 2003: "I'm looking for an ASIAN FEMALE OR EURO GIRL" (Los Angeles
21 apartment); "***Asian preferred** I am **Asian preferred**" (Los Angeles area
22 house); "I am NOT looking for black muslims" (Los Angeles area 2-bedroom
23 apartment); "prefer 18-25 (year-old) white males" (San Diego apartment); "I am
24 looking for Asian/Spanish persons to share the apartment" (Los Angeles area
25 apartment); "I am seeking a single Asian Male or Female student or working
26 professional . . ." (Los Angeles area townhouse); "The person applying for the room

27
28 ³Plaintiffs also note that *ChristianGrl* uses defendant's preference fields to further
limit this rental opportunity to persons aged 18-35 who are straight and have no children.
Id. These limitations can be seen throughout the exhibits.

1 MUST be a BLACK GAY MALE!" (Los Angeles); "I am a 29 year-old Asian-
2 American professional looking for the same to share a fully-furnished 2-bedroom, 2-
3 bathroom apartment in a beautiful gated hilltop community." (Los Angeles); "Asian
4 preferred" (Los Angeles area 3-bedroom house); "PLEASE NO WHITE TRASH,"
5 (Anaheim house).

6 With respect to religion, and as shown in Statements 56-68 and in Exhibit 10,
7 the following statements are among those that appeared in November and December
8 2003: "I am looking for a straight Christian male, who is serious about his Christian
9 walk with God to help fill an empty house" (4 bedroom house in Orange, California); "I
10 am NOT looking for black muslims" (Los Angeles area 2-bedroom apartment);
11 "Would love to find a Christian if possible" (Corona del Mar townhouse); "we have
12 certain Christian rules" (San Diego house) "Christian would be good" (Diamond Bar,
13 California 3 bedroom house); "A Christian would be great" (3 bedroom house in
14 Oceanside, California); "Please only Christian or strong moraled need inquire" (Los
15 Angeles area house); "This is a Christian home and we are looking for a Christian
16 female to rent a downstairs room" (Los Angeles area house); "Looking for a Christian
17 guy to take a room immediately" (Los Angeles area townhouse); "prefer a Catholic or
18 Christian" (San Diego area 5-bedroom house); "it is important to us that our third
19 roommate be a Christian as well" (San Diego area 3-bedroom townhouse); "I am
20 looking for a neat freak, christian, non smoking, straight, friendly female to share 2
21 bedroom apartment with. I am all of the above." (Sherman Oaks 2-bedroom
22 apartment); "I prefer a Christian male, no women allowed in home, living for Christ
23 is the main thing. (Los Angeles area house). Ex. 10.

24 And in June 2004 without the benefit of the Keyword search feature⁴ the
25 following statements were found on Defendant's website: "Looking for a
26

27 ⁴After Plaintiffs began monitoring Defendant's website using the Keyword Search
28 feature on the website, and after Plaintiffs sent Defendant a letter regarding the fair
housing implications of the numerous statements, Defendant simply removed the feature.
This prevented Plaintiffs from finding statements. Ex. 17

1 Christian roommate." (Los Angeles apartment); "Looking in particular for a Christian
2 roommate." (Los Angeles apartment); "Looking for a employed Christian male." Id.
3 69.

4 The above-described statements were all found with limited search capabilities
5 while focusing on only two cities, and in a short periods of time. In other words, the
6 sampling set forth above and in the Separate Statement of Undisputed Facts is just the
7 tip of the iceberg. Over a year's time, there must be hundreds of such statements in
8 Southern California alone.

9 Roommate.com has advertised testimonials that appear throughout the pages of
10 the website and which show alleged statements by members showing a focus on
11 protected classes. One testimonial alleged by defendant is by a repeat customer-
12 landlord who found a "perfect" match. "He is Christian as I and a conservative as I,"
13 reads the testimonial. Id. 70.

14 There are also men who offer their apartment and rooms solely to women only,
15 several of which would require sexual favors from those women. Id. 71. "rdmmoyer",
16 for example, will offer "free rent for the right woman." He would "prefer to have
17 Hispanic female roommate" but he also says "I love Asian females." Another 47 year-
18 old male offers \$1 rent per month to move into his 3 bedroom house saying he's
19 looking for "sex starved" female tenants and he offers "special consideration for
20 participating nymphomaniacs." Exhibit 11 contains other and much more sexually
21 explicit "quid pro quo" offer from male landlords. Id..

22 There are gay and lesbian landlords who make their units available only to other
23 gay or lesbian persons looking for a place to live. Id. 74.

24 There are landlords making it clear that forms of public assistance are
25 unacceptable and defendant has marketed this benefit using testimonials. "AFDC not
26 acceptable" (Even though the rent is \$500). Id. 75.

27 Finally, there are persons with places to rent who state that certain disabilities
28 are unacceptable, such as HIV and mental disabilities ("unmedicated"). Id. ¶ 76.

1 **D. Defendant's Refusal To Stop or Even Reduce Discrimination on Its Website**

2 Plaintiffs contacted in November of 2003 and in a comprehensive letter
3 described some of the above statements to Defendant and their impact on the Plaintiffs
4 and the communities. Id. 77. However, the Defendant's counsel said Defendant was
5 both "unable and unwilling to monitor, edit, or screen the individual listings."
6 Defendant has also stated that it had received a similar complaint from a fair housing
7 group in Buffalo, New York. Id. The statements continue and the website still
8 contains no information about fair housing. Id. 78. Defendant does take the time to
9 monitor its thousands of listings for evidence that members are circumventing the rules
10 and providing contact information without paying Defendant. Id. 79. Defendant has
11 also reserved the right to monitor, edit, screen or remove any material on its website.
12 Id. 80.

13
14 **III. ARGUMENT**

15 **A. Legal Standard for Summary Judgment**

16 Summary judgment is proper only when the moving party demonstrates the
17 absence of any genuine issue as to any material fact and that moving party is entitled
18 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Defendant's summary
19 judgment motion seeks to have all of plaintiffs' claims dismissed, and so therefore
20 Defendant must show the absence of any genuine issue as to all material facts. As
21 discussed in detail below, the summary judgment standard requires that Defendant's
22 motion be dismissed.

23
24 **B. Triable Issues of Fact Exist As To Plaintiffs' Claims under the Fair**
25 **Housing Amendments Act, the California Fair Employment & Housing**
26 **Act, The Unruh Act, and the Unfair Competition Act.**

27
28 Defendant's mischaracterization of Plaintiffs' claims as resting "completely

1 on defendant's publication of user-supplied content" and its short shrift of the fair
2 housing laws require a brief discussion of those laws and Defendant's violations
3 before seeing whether any immunity or First Amendment protection applies.

4
5 A. Discriminatory Profiling and Advertisements In The Rental of Housing

6 The federal and state statutes prohibit the making or publishing of
7 discriminatory housing statements. They also prohibit treating persons differently, or
8 denying any person access to a rental service based on a protected class. The federal
9 Fair Housing Act as amended in 1998 (FHAA) provides in part, that:

10 [I]t shall be unlawful

11 To make, print, or publish, or cause to be made, printed, or published any
12 notice, statement, or advertisement, with respect to the sale or rental of
13 a dwelling that indicates any preference, limitation, or discrimination
14 based on race, color, religion, sex, handicap, familial status, or national
15 origin, or an intention to make any such preference, limitation, or
16 discrimination." 42 U.S.C. §3604 (c).

17 To deny any person access to or membership or participation in any multiple
18 listing service, real estate brokers' organization or other service, organization,
19 or facility relating to the business of selling or renting dwellings, or to
20 discriminate against him in the terms or conditions of such access, membership,
21 or participation, on account of race, color, religion, sex, handicap, familial
22 status, or national origin. 42 U.S.C. §3606

23 The California Fair Employment and Housing Act (FEHA) as amended in 2000
24 adds several protected classes, providing in part that:

25 "[I]t shall be unlawful

26 For any person to make, print, or publish, or cause to be made, printed, or
27 published any notice, statement, or advertisement, with respect to the sale or
28 rental of a housing accommodation that indicates any preference, limitation, or
discrimination based on race, color, religion, sex, sexual orientation, marital
status, national origin, ancestry, familial status, source of income, or disability
an intention to make any such preference, limitation, or discrimination. Cal.

(j) To deny a person access to, or membership or participation in, a multiple
listing service, real estate brokerage organization, or other service because of race,
color, religion, sex, sexual orientation, marital status, ancestry, disability, familial

1 status, source of income, or national origin.

2 Cal. Govt. Code §12955 (c) and (j).

3 Both laws prohibit any person or corporation from aiding, abetting, inciting,
4 compelling, or coercing the doing of any fair housing violation. Cal. Govt. Code
5 §12955(g).

6 The California Unruh Civil Rights Act (Unruh) adds "age" as a protected
7 class for purposes of all housing. Cal. Civil Code § 51.2.

8 Finally, a violation of any of these laws is borrowed by Cal. Bus. & Prof. Code
9 §17200 as another and separate violation of that unfair business practices law. Any
10 unfair practice that may not be expressly illegal but has a harm to the public that
11 outweighs its good is also a violation of §17200. Injunctive relief is authorized, and
12 any private party, whether directly injured or not, has standing to sue to stop such
13 violations. §17204.

14 In prohibiting advertisements, statements, inquiries or other notices which
15 indicate a discriminatory preference in the context of selling or renting of a dwelling,
16 § 3604(c) does not require evidence of discriminatory intent. Fair Housing Congress
17 v. Weber, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997). An oral or written statement
18 violates §3604(c) if it suggests a preference, limitation or discrimination to the
19 "ordinary listener" or reader. United States v. Hunter, 459 F. 2d 205, 215 (4th Cir.
20 1972); see also Ragin v. New York Times Co., 923 F. 2d 995, 999 (2d Cir. 1991) ("we
21 read the statute to be violated if an ad for housing suggests to an ordinary reader that
22 a particular race is preferred or dispreferred for the housing in question"); see also
23 Housing Rights Center et al. v. The Donald Sterling Corporation, 274 F. Supp. 2d
24 1129, 1148 (C.D. Cal. 2003) (aff'd, 2003 U.S. App. LEXIS 25266 (9th Cir. 2003).
25 Furthermore, the Hunter and Ragin decisions make it clear that §3604(c) applies to
26 publishers of such statements, even when the statements are originally made by a third
27 party, and that this prohibition does not violate any free speech or free press
28

1 protections. Hunter at 210-11.

2 Finally, §3604(c) and §12955(c) apply to all types of housing including rooms
3 for rent and shared living quarters. This is evident by comparing these statutes with
4 the preceeding statutes such as §3604(a) which limit applicability of refusal to rent and
5 differential treatment to all housing beyond owner-occupied housing (the "Mrs.
6 Murphy" exemption). The Mrs. Murphy exemption does not apply to statements and
7 inquiries because the Mrs. Murphy exemption is subject to the phrase that begins
8 §3603(b) providing that nothing in §3604 of this Title (other than subsection (c)) shall
9 apply to" these exempted situations. Even a newspaper can be liable for printing a
10 single discriminatory statement coming out of Mrs. Murphy exemption dwelling.
11 United States v. Hunter, 459 F. 2d 205, 215 (4th Cir. 1972). Commentators and courts
12 have spelled out three main purposes for giving §3604(c) a wider berth:

13 These three main purposes of 3604(c) - avoiding market narrowing, protecting
14 against psychic injury, and public education - have a direct bearing on the FHA's
15 ultimate goals. The Congress [*251] that passed the original FHA sought not
16 only to eliminate housing discrimination but also to replace segregated living
17 patterns with truly integrated communities. (cite omitted) FHA goals can only
18 be achieved if the highly entrenched system of discrimination that pervaded
19 America's housing markets in 1968 is both eliminated and perceived as
20 eliminated. As the Hunter opinion points out, the "market-limiting" effect of
21 3604(c) violations - and, as we have seen, all three of 3604(c)'s main purposes
22 relate to this problem - discourages home seekers from believing housing
23 markets are open to all.

19 Article, Robert Schwemm, DISCRIMINATORY HOUSING STATEMENTS
20 AND 3604(c): A NEW LOOK AT THE FAIR HOUSING ACT'S MOST
21 INTRIGUING PROVISION, 29 Fordham Urb. L.J. 187, 250-251 (October 2001).

22 California statutory law makes the sweep of §12955(c) even more specific, as
23 §12927 (2) states in relevant part:

24 "Discrimination" does not include either of the following: (A) Refusal to rent
25 or lease a portion of an owner-occupied single-family house to a person as a
26 roomer or boarder living within the household, provided that no more than one
27 roomer or boarder is to live within the household, and the owner complies with
28 subdivision (c) of Section 12955, which prohibits discriminatory notices,
statements, and advertisements. (B) Where the sharing of living areas in a single
dwelling unit is involved, the use of words stating or tending to imply that the
housing being advertised is available only to persons of one sex.

1 Plaintiffs note that all of Defendant's argument about whether the fair housing
2 laws reach shared living situations is addressed by this statute which clearly states that
3 the single exception to the ban on discriminatory housing statements is the use of
4 words to show that a particular sex is preferred.

5
6 **B. Defendant's Screening and Advertising Practices**

7 While acting as a commercial rental services provider, Defendant is doing three
8 things that independently violate the fair housing laws and cause monthly cascades of
9 violations: First, the Defendant itself is demanding the prohibited screening
10 disclosures from renters. Second, Defendant is causing its members who have places
11 available to rent to make many of these preferential statements so that Defendant can
12 then make matches for housing opportunities based on these prohibited characteristics.
13 Third, defendant is packaging and distributing advertisements for housing
14 opportunities that contain numerous statements that show blatant preferences or dis-
15 preferences based on race, color, national origin, religion, gender (including sexual
16 harassment), disability, sexual orientation, and familial status.

17 **a. Demanding disclosures from renters about their gender, sexual**
18 **orientation, age, and familial status.**

19 Defendant is taking membership money in order to provide the service similar
20 to that many property managers provide in Los Angeles and San Diego. Bruno Decl.
21 ¶ 18. Defendant is, in effect, screening the renters, by forcing the renter (the person
22 who has identified herself as a someone "looking for a place to live") to answer a lot
23 of questions about themselves before they can even become a member—much less get
24 access to the large number of housing opportunities available on Defendant's website.
25 As described above in the facts section, the person who doesn't want to disclose their
26 sexual orientation, for example, is greeted with a pop-up box stating that "Sexual
27 Orientation is Required." Pltf. Stm. 38. The questions are written by the defendant.
28 Id. 39. In other words, no third party is involved nor providing the content in question

1 here, content that keeps people out if they don't want to disclose.

2 The question of whether inquiries into a renter's membership in a protected class
3 was very recently decided in a published decision out of this federal district. In
4 Housing Rights Center et al. v. The Donald Sterling Corporation, 274 F. Supp. 2d
5 1129 (C.D. Cal. 2003) (aff'd, 2003 U.S. App. LEXIS 25266 (9th Cir. 2003), the
6 plaintiffs, including a fair housing council, moved for a preliminary injunction to stop
7 defendants from, among other things, asking for information about renters' and
8 applicants' birthplace on an application for a remote control device for an apartment
9 tower's garage door. The court ruled that such questions violated § 3604 (c). Housing
10 Rights Center at 1148. In reaching this conclusion, the district court relied upon the
11 decisions of the Second and the Seventh Circuits in Soules v. Dept. of Housing and
12 Urban Development, 967 F. 2d 817, 824 (2d Cir. 1992) and Jancik v. Dept. of Housing
13 and Urban Development, 44 F. 3d at 557, which stated that questions about protected
14 classes suggested a racial screening process in violation of the fair housing laws.

15 The facts show that with respect to these inquiries, Defendant is acting as a
16 managing agent.⁵ Before a third party is even involved, much less providing content,
17 Defendant is screening persons based on age, sexual orientation, familial status, and
18 gender and then makes these names available to its members who have a place to live.
19 Thus, Defendant violates §3604(c) and/or §12955(c) with the disclosure demands so
20 that Defendant can move to the next step in the process: violating §3604(a); §3606 and
21 §12955(c) (a) and (j) when it using the information to decide which housing
22 opportunities will be made or withheld.

23
24
25 ⁵At § 3603 (c) there is independent liability created for the Defendant because "a
26 person shall be deemed to be in the business of selling or renting dwellings if:

27 (2) he has, within the preceding twelve months, participated as agent, other than
28 in the sale of his own personal residence in providing sales or rental facilities or
sales or rental services in two or more transactions involving the sale or rental of
any dwelling or any interest therein. §3603(c).

1 **b. Defendant forces persons who have a place to rent to select and make**
2 **discriminatory statements so that Defendant can set up a discriminatory**
3 **matching and distribution scheme.**

4 The formatted inquiries for persons who have place to rent are found under
5 "Renting out a room" at Exhibit 20. Here, the Defendant's instructions have been
6 written with mandatory language, i.e. "Select the Criteria." These criteria and the
7 statements written by the defendants force the landlord to consider sexual orientation
8 (an act prohibited by §12955(c)), the presence of children (prohibited under both
9 §3604(c) and §12955(c), and age (prohibited under §51.2 of the Cal. Civil Code)
10 whether they planned to do this or not.

11 This sets up the matching system described by Mr. Bryan Peters in his
12 Deposition. See Ex. 27; Pltf. Stm. ¶ 85-87. The matches are made based on the
13 protected class memberships. Defendant then distributes them to the members so they
14 can review one another's profiles. This system unlawfully calibrates housing
15 opportunities to a person's membership in a protected class.

16 **c. Publishing egregious race, national origin, color and religion statements**

17 In the Separate Statement of Genuine Issues, Plaintiffs have set forth numerous
18 statements which appear in rental listings and state a preference based on race, color
19 or religion. Plaintiffs have set forth many more statements that state preferences based
20 on gender (including sexual quid pro quo demands), source of income, disability,
21 family status, sexual orientation. Take any of these statements, such as "Asian
22 Preferred" or "I prefer a Christian male" or "NOT looking for black muslims" and an
23 application of the "ordinary reader or listener" standard would deem any and all of
24 these statements as indicating a discriminatory preference in violation of either
25 §3604(c) or §12955(c). Yet, Defendant, as part of its rental service, has chosen to
26 package these types of statements with its other problematic formatting demands in
27 order to provide a property management screening system that no one else provides
28

(because it's illegal). Defendant has also certainly aided, abetted or incited many of these violations by encouraging or forcing them, in violation of the fair housing laws.⁶

C. The Communication Decency Act Does Not Immunize Defendant From Liability Arising from Its Screening & Matching Services Nor From The Widespread Practices of Rental Advertising Based on Race, Religion, And Other Protected Classes.

Through The Communication Decency Act's Section 230(c)(1) Congress granted "most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." Carafano v. Metrosplash.com, Inc. 339 F. 3rd 1119, 1123 (9th Cir. 2003). This recent Ninth Circuit description of the CDA's immunity gives three reasons why the immunity does not apply to Roommates.com:

- 1) This is not a case about false or defamatory language; it is about rental advertising, disclosure demands and matching systems based on protected classes, and egregious statements in the rental of dwelling that tell, for example, a black muslim, that this landlord will not rent to him;
- 2) This is a case where most of the discriminatory practices and formatted statements do not involve a third party content-provider; and,
- 3) This case involves an Internet service that doesn't just show the offending statements. It distributes them on a massive scale through email and e-

⁶Ironically, Defendant states in its brief that fair housing can be "better advanced by educational advertisements than by interfering with the efforts of individuals seeking compatible living partners and imposing a burden on an interactive computer service that will put it out of business." Brief at 17. As has been said before, the Fair Housing Councils' education and outreach efforts are undermined by Defendant which refuses to put any fair housing information on its website. This refusal sets its members up for committing violations, but it keeps them ignorant so that they will pay Defendant for a unique service that other law-abiding newspapers and websites won't provide.

1 newsletters. Since at least November of last year, upon a comprehensive letter
2 from the Fair Housing Councils, the Defendant has known it was distributing
3 discriminatory statements.

4
5 Those facts show that Roommate.com, LLC does not get any immunity. But
6 even if the Court were inclined to rule that Roommate.com does not demand disclosures
7 irrespective of third party content or that has a discriminatory matching system, there
8 is still no binding authority for saying that CDA somehow trumps the fair housing
9 laws.⁷ In fact, the Supreme Court has stated that it is the Fair Housing Act that must
10 be given a "generous construction" in order to carry out a "policy that Congress
11 considered to be of the highest priority." Trafficante v. Metropolitan Life Ins. Co., 409
12 U.S. 205, 211, 212 (1972). Indeed, a Note published by the Stanford Law Review
13 asserted that the generous construction and high priority for fair housing goes double
14 for rental websites:
15

16 Given the massive scale of Internet communications, a legal
17 regime that allowed the Internet to become a safe haven for
18 housing discrimination could have disastrous consequences
19 for the important goals that Congress put on the national
20 agenda in 1968: the eradication of housing discrimination
21 and the promotion of diverse communities across America.
22 With so much at stake, Congress could not have intended,
23 in passing the [Communications Decency Act], to
24 undermine these monumental commitments with nary a
25 discussion of the possible consequences.

26 Note, Jennifer C. Chang, In Search of Fair Housing in Cyberspace: The Implications
27 of the Communications Decency Act for Fair Housing on the Internet, 55 Stan. L. Rev.
28 969, 1001 (Dec. 2002).

29 Moreover, "Congress did not articulate any intention that § 230 [of the

30
31 The Noah v. AOL case cited by Defendants as a civil rights case is not only from
32 another jurisdiction, but it involved a plaintiff who represented himself and where the
33 alleged civil rights violations occurred in a chat room. This is hardly the case to compare
34 to this one where housing opportunities are being narrowed, segregation re-enforced, and
35 alienating statements circulated.

1 Communications Decency Act] limit the applicability of the [Fair Housing Act's]
2 advertising provisions to [Internet service providers], either in the text of § 230 or at
3 any point in its legislative history." *Id.* at 1011. Congress's silence "suggests that
4 Congress did not intend for the fair advertising mandates to be abrogated." *Id.* As the
5 Supreme Court has explained, "courts are not at liberty to pick and choose among
6 congressional enactments, and when two statutes are capable of co-existence, it is the
7 duty of the courts, absent a clearly expressed congressional intention to the contrary,
8 to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 537-45 (1974).
9 Rather, "[i]n the absence of some affirmative showing of an intention to repeal, the
10 only permissible justification for a repeal by implication is when the earlier and later
11 statutes are irreconcilable." *Id.* at 550. The Communications Decency Act and the
12 Fair Housing Act are in no sense irreconcilable. The CDA immunizes websites for
13 tort liability in obscenity and defamation cases, while the Fair Housing Act creates
14 liability and protection for and from certain civil rights violations. Therefore, if there
15 is any violation of any fair housing law, the CDA should never provide a defendant a
16 free pass for a violation.

17 Even if there is any immunity at all from the fair housing laws, pursuant to §230,
18 information content providers remain liable for advertising that violates the Fair
19 Housing Act where they are responsible in any way for the content of the advertising.

20 As demonstrated in the Stanford Law Review article, the fact that publishers of
21 rental listings become "crucial intermediaries" in a housing transaction makes
22 §3604(c) a much broader statute regarding publications and civil rights liability than
23 what the CDA encompasses with respect to liability for pornography and defamation.
24 Note at 1001.

25 Even if the CDA affects the Fair Housing Act at all in other cases, the fact that
26 Roommates.com sets itself up as an indispensable commercial intermediary—in other
27 words, the person looking for a place to live must pay to be a member to read the
28

1 listings and get matched with a landlord—makes this case an even stronger argument
2 for a reading of the statutes that still gives §3604(c) effect and makes defendant liable
3 for each and every race and religion statement it allows to be posted.

4 Here, where the Defendant has placed itself between persons looking for
5 housing and persons with housing available to rent, Defendant has become a crucial
6 intermediary in a housing transaction. See Fair Housing Council of Bergen County,
7 Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071, 1075
8 (D.N.J. 1976) (Court noting that such services may serve as “crucial intermediaries”
9 between buyers and sellers of residential real estate). This large role and the Fair
10 Housing Act’s high priority ranking makes §3604(c) a much broader statute regarding
11 “Publishers” than what the CDA encompasses with respect to obscenity or defamation.
12 Therefore, the statutes read together still give §3604(c) [and its California equivalent
13 for that matter] and makes defendant liable for each race and religion statement it
14 publishes.

15 In sum, Congress never intended for the Internet to be a place where housing
16 providers and their advertisers and agents could sneak back to the early part of the last
17 century and begin posting “signs” that state “Whitehme” or “White males only” or
18 “Asian Preferred” or “I prefer a Christian male, no women allowed in home.” that so
19 obviously offend, alienate and humiliate persons who are just looking for a place to
20 live in cities where it is already very difficult to find homes.⁸

21
22 D. Defendant's First Amendment Argument is Groundless

23 The illegal commercial messages such as “NOT looking for black muslims,”
24 “Asians preferred” and the many others at Plaintiffs’ Genuine Issues ¶¶ 46-76 are not
25 entitled to First Amendment protection. Neither is Defendant’s screening and
26

27
28 ⁸Also, the United States Department of Justice has prosecuted www.sublet.com,
another rental website. As shown in Ex. 28 (and Pltf. Stm. ¶ 83), the DOJ believes that
the fair housing laws must be applied rigorously to the internet.

1 matching services. Even with just respect to the issue of the statements, Defendant
2 is asking the court to issue a First Amendment ruling that would:

3 1) Contradict the long-respected Court of Appeal decision in United States v.
4 Hunter, 459 F. 2d 205, 215 (4th Cir. 1972);

5 2) Invalidate the California statute Govt. Code §12927 which clearly states that
6 §12955(c) prohibition against discriminatory statements covers all shared living
7 quarters situations except for gender preference;

8 3) Would ignore the facts that Defendant is not a speech-maker for First
9 Amendment purposes, but a commercial rental services website that actively groups
10 members based on protected classes, distributes information about housing
11 opportunities based on protected class membership which is all pro-active
12 discrimination for commercial purposes.

13 Beginning with the Hunter decision, courts have rejected First Amendment
14 claims in §3604(c) cases simply because discriminatory statements are illegal. Relying
15 primarily on the Supreme Court's decision in Pittsburgh Press Co. v. Human Relations
16 Comm'n, the Second Circuit has more recently stressed that the housing
17 advertisements banned by 3604(c) relate to illegal commercial activity. "As was the
18 case with the Pittsburgh ordinance prohibiting employment discrimination and ads
19 indicating such discrimination in Pittsburgh Press, the Fair Housing Act prohibits
20 discrimination in the sale or rental of housing, as well as ads that indicate a racial
21 preference. Ragin v. New York Times Co., 923 F. 2d 995 (2d Cir. 1991) (relying on
22 Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)). Thus,
23 illegal acts and practices have no protection whatsoever, and thus the Defendant's
24 remaining analysis under the Central Hudson test is completely unnecessary.⁹

25 However, a few of Defendant's arguments should be addressed. First, Defendant
26

27
28 ⁹Professor Schwemm's Fordham article also completes the Central Hudson test
analysis and concludes that Hunter's conclusion that §3604(c) does not violate the First
Amendment "is still sound." 275-276.

1 argues throughout (starting in the Brief's second sentence on page 1) that this is case
2 about the basic personal rights of individual apartment-seekers. It is not, of course.
3 Rather, the "rights" Defendant are asserting are those of a particular media business
4 that charges people who are looking for a place to live to be screened and matched up
5 with rooms for rent. This is an important distinction, and one that the Fair Housing
6 Act recognizes -- for example, the fact that the "Mrs. Murphy" exemption applies to
7 protect choosing co-residents but not to public advertising for them; and in the holding
8 of the first appellate decision on 3604(c) -- United States v. Hunter -- that the carrying
9 media there (a newspaper) can be subject to 3604(c) based on an ad placed by a "Mrs.
10 Murphy" landlord. It is perfectly possible to protect whatever personal rights
11 apartment-seekers or roommates may have without exempting this Defendant from the
12 fair housing laws. This also goes to the point in the Defendant's brief arguing that the
13 fair housing laws were not intended to control roommate selection (pages 21-22); one
14 could agree with this as a general proposition without in any way conceding that
15 Defendant's practices aren't covered by 3604(c).¹⁰

16 Defendant's speech does not necessarily get more protection than "Commercial
17 Speech" just because it includes additional information. See, e.g., Bolger v. Young
18 Drug Co., 463 U.S. 60 (1983) (treating pamphlet that included ad for prophylactics as
19 commercial speech even though the pamphlet included related health information).
20 Professor Schwemm, in his aforecited Fordham article on 3604(c) (which the
21 Defendants cite elsewhere), he concludes that all communications covered by 3604(c)
22 should be categorized as commercial speech (see page 269-71).

23 Defendant cites to Moore v. City of East Cleveland to argue that the Supreme
24 Court thinks the Due Process Clause "does not permit government to control living
25

26
27 ¹⁰On a related point, the argument in fn. 8 that this defendant's Free Exercise rights
28 is being infringed under Employment Div. v. Smith is a particularly egregious extension
of the Defendant's self-identification with the person looking for a place to live.
Obviously this defendant has neither a religion nor is its "right of intimate association"
being harmed.

1 situations." On the contrary, the Court in Village of Belle Terre v. Boraas, 416 U.S.
2 1 (1974) reached exactly the opposite conclusion and then made clear in Moore that
3 it was ruling against the government there only because the living situation involved
4 a blood relatives (as contrasted with Boraas, which ruled for the government in a case
5 involving a group of college students living together). The point is that the Due
6 Process "right" to choose one's living companions is very limited, applying only to
7 traditional "families" and certainly not to most roommate-seeking situations.

8 Finally, Defendants' claim that "monitoring of text would be a crushing burden."
9 This is nonsense. Given a computer program's ability to easily search for certain
10 objectionable words, such as those outlined in 24 C.F.R. Part 109. The Defendant
11 has a Key Word Search feature it can use. It can also alert its members to the fair
12 housing laws which would dramatically reduce discrimination. Finally, it can make
13 the disclosures voluntary and provide footers on the questionnaire that in California
14 and other states, age, sexual orientation, family status are protected classes. Other
15 rental websites have come under compliance, some after being pursued by the Dept.
16 of Justice, and they're still in business. See Ex. 26; Statements 83-84.

17 Even if it's true that there is any burden, so what? If a product causes harm,
18 shouldn't the manufacturer be required to take steps (some of which surely will cost
19 money) to curb this harm? The costs would then be passed on in higher prices. And
20 if the society is not willing to pay a high enough price for an overall safe product, then
21 the manufacturer just doesn't get to market that product (at least without taking the risk
22 of liability).

24 E. Unlawful business practices

25 Several triable issues of fact remain because Defendant simply failed in its brief
26 to inform the court that it is engaged in active quests for each person's protected
27 characteristics, that it distributes the unlawful profiles as matches, that the matches are
28

1 based on unlawful criteris, and that there is no fair housing information on their
2 website. These violate the fair housing laws, but the declarations of the Fair Housing
3
4 Councils make clear that they are doing a great deal of harm. Therefore, each of these
5 unfair or unlawful acts are violations of the Cal. Bus. & Professions Code §17200.
6
7

8 **CONCLUSION**

9
10 The Defendant has assumed a role of a managing company that is the crucial
11 intermediary for thousands and thousands of rental housing transactions. Therefore,
12 it is not entitled to protection by the Communication Decency Act or the First
13 Amendment with respect to its egregious practices that flaunt the federal and
14 California fair housing laws, and several triable issues of fact remain. Plaintiffs ask
15 that the court deny Defendant's motion for summary judgment.
16
17

18 DATED: 8-27-04.

19 Respectfully submitted,
20

21
22 By: Gary W. Rhoades
23 Gary W. Rhoades
24 Attorney for Plaintiffs
25
26
27
28

CERTIFICATE OF SERVICE

I am over the age of 18 years and am not a party to the within action. My business address is 834 1/2 S. Mansfield Ave., Los Angeles CA 90036

On August 27, 2004, I served a true and correct copy of the following document(s):

PLAINTIFFS' OPPOSITION TO SUMMARY JUDGMENT; POINTS & AUTHORITIES; EXHIBITS, STATEMENT OF GENUINE ISSUES; DECLARATIONS OF GARY RHOADES, DIANA BRUNO, MARY SCOTT KNOLL, and MICHAEL PETERS.

upon the following person(s):

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in the following manner(s):

<input checked="" type="checkbox"/>	BY HAND DELIVERY: By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above.
<input type="checkbox"/>	BY MAIL: By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth above.
<input type="checkbox"/>	BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY): By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day.
<input type="checkbox"/>	BY FACSIMILE: By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above.

I declare under penalty of perjury that the above is true and correct.

Executed on August 27, 2004, at Los Angeles, California.


Gary Rhoades

CERTIFICATE OF SERVICE

000027

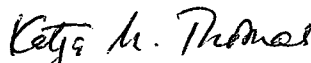
CERTIFICATE OF SERVICE

I, Katja M. Thomas, declare as follows: I am a citizen of the United States and a resident of the State of California. I am over the age of 18 and not a party to the within action; my business address is 8205 Pescadero Road, Loma Mar, CA 94021. On July 20, 2005, I served the foregoing documents described as APPELLANTS' REPLY BRIEF AND ANSWERING BRIEF TO THE CROSS-APPEAL and APPELLANTS' SUPPLEMENTAL EXCERPTS OF THE RECORD on the parties to this action and mailed it to the Clerk of this Court by placing a true copy thereof enclosed in a sealed envelope or box with postage thereon fully prepaid, in the United States mail at Pescadero, California, addressed to:

see attached service list

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 2005, at Loma Mar, California.



Katja M. Thomas

SERVICE LIST

Fair Housing Council of San Fernando Valley;
Fair Housing Council of San Diego
v. Roommates.com, LLC

Consolidated Case Nos. 04-56916 and 04-57173

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